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United States Circuit Court of Appeals

For the Ninth Circuit

JOHN R. SOUZA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA.

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STERLING CARR,
United States Attorney.

T. J. SHERIDAN,
Assistant United States Attorney.
Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 47044

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STATEMENT

This is a writ of error to the District Court of the Northern District of California to reverse the conviction of J. R. Souza, hereinafter called the defendant, for three several violations of the National Prohibition Act.

On April 20, 1922, an information in three counts was presented against the defendant. In the first count it was charged that on the 9th of March, 1922, at 2202 E. 17th Street, Oakland, California, he had in his possession certain property designed for the *manufacture* of liquor, and a 50-gallon still, 12 fifty-gallon barrels of mash and certain machinery was specified. Other appropriate allegations were made,

stating that the possession was in violation of Section 25 of Title 2 of the Act;

The second count charged that at the same time and place and under the same circumstances defendant *possessed* certain intoxicating liquor, to-wit: fifty gallons of Jackass Brandy, with other appropriate allegations;

The third count charged that at the same time and place the defendant *manufactured* certain intoxicating liquor, to-wit: Fifty gallons of Jackass Brandy, other appropriate allegations being added.

The defendant having been arraigned pleaded not guilty and was brought on for trial on the 9th of April, 1924, and convicted upon all four counts (Tr. p. 31). Thereupon he was sentenced upon the conviction to pay a fine of $500 on the first count, a fine of $500 on the second count and be imprisoned for one year in the San Francisco County Jail on the third count. (Tr. p. 32).

There is a bill of exceptions in the record of comparatively narrow compass. There was no motion for a directed verdict nor has the charge of the court been brought up. There was no antecedent motion to quash any such warrant or to exclude or suppress evidence. The exceptions urged were not to exceed nine in number and were taken wholly in respect to the admission of the testimony.

The assignments of error appear at page 42 of the Transcript and are exceedingly general and in-

definite in respect to the rulings complained of. At the trial three witnesses testified on behalf of the government and the defendant gave certain testimony on his own behalf.

Witness SHURTLEFF, a prohibition officer and four years in the service, visited the premises at 2202 E. 17th Street, Oakland, California, the premises owned by the defendant, and testified:

"The defendant lives on the premises. The still was found in a tunnel or dugout, as I would call it, underneath the house. I had visited the premises prior to this and had noticed the odor of distillation and fermenting mash around these premises. I am familiar with the odor of fermenting mash and the odor of distillation; a day or so before the search-warrant was secured for the place I visited the place one night, and I could smell odors of distillation and of mash.

On March 9th I was accompanied by Agent Rinckel, Agent McMahon and Agent De Spain. We found a distillation plant. I think it was 50 gallon barrels, and we also found an electric fan, or a fan and the motors to run it, and an electric pump. This dugout—the reason for that was underneath the basement it is a very low basement under the house, I should say about maybe four of five feet; you have to stoop over to walk under it, and we entered from the side of the house, he had a trap-door at the side of the house; we crawled under there; we shoveled away the dirt and found a trap-door about two feet quare and going down through this trap-door on a ladder, I guess about 10 feet

deep underneath this house, this dirt floor, was this dugout that I described, and in the dugout was a complete distilling apparatus."

Witness identified a distilling plant, also a sample of liquor and certain bottles and said further:

"We visited these premises on a prior case, to-wit, May 9, 1921. We found 10 or 12 50-gallon barrels of mash, 50-gallon stills set up and running, and stands and motors and found Mr. Souza in the dugout,"and that on this case we found all this property in the same place.

On cross-examination witness said:

"These premises are located at 2202 East 17th Street, Oakland, California. At that time Mr. Souza resided there. I think I see his wife, see a lady there. I think it was his wife. I had a conversation with her. I think it is a home residence. It is not very far from the street, approximately five or ten feet on one side and maybe twenty on the end. Corner house. There is a lawn around it and a fence around the yard. I did not have to go into the house to get into this dugout. If I have my directions right the house faces the south and we entered through a little door on the east side of the house from the outside of the house. We got into the yard through the front gate and walked around to the side of the house. A little door on the side of the house led under the house; beneath the house proper, and we crawled in underneath; we came to this dugout; the dugout was directly beneath the house proper. At the time we search the premises March, 1922, I did not enter the residence there. Nor the other officers to my knowledge. It is not the fact that at the time I searched the premises I went

into the residence, went into the home, into the house proper, that I went through the house proper; I went through a trap-door near to the house into this dugout. I do not know as to the trap-door, neved called to my attention that there was a trap-door. I did not see a trap-door immediately above the entrance to the dugout which went into the residence proper. It isn't a fact that Commissioner Hardy went out there with me. Nor did he go with the other officers to my knowledge. I entered the premises by virtue of a search warrant issued by Commissioner Hardy of Oakland. The still was in the dugout, as I call it. The only thing I could not figure out was that he dug this dugout under this board floor underneath the house for a still room only; in fact, he told me himself that it cost him about $1500 to fix the dugout and his property that he had there cost him about $1500. It was not used for other purposes. I saw nothing else there besides the property we took. It was not used as a cellar or part of the residence. This dugout or cellar or basement is immediately below the house proper; underneath the house proper, and within the fence that encircled around the house. We were compelled in order to go into the premises to go through a gate, the front gate, and enter the premises; go to the side of the house; go through a small door; crawl on our hands and knees for some distance and then dig away some dirt and then enter this dugout; I say we entered there pursuant to that search-warrant. I or any other person to my knowledge did not purchase or buy any liquor from the defendant there; not that I know of. There was not a sale of intoxicating liquor upon the premises to my individual knowledge. I smelled the odor of distillation there some time previous to the raid,

previous to March 9, 1922. I was told that there was liquor being manufactured on the premises. Upon that information and upon the information of my senses; that is my sense of smell, I went to the Commissioner and had a search-warrant issued for the basement, for this dugout. This hole down there was eight by ten by twelve, something like that."

Witness RINCKEL testified substantially as follows:

"I am a prohibition officer; have been for the last four years. Accompanied Agent Shurleff on the 9th day of March, we entered the front gate at 2202 E. 17th Street, Oakland; walked around to the east side and crawled under the house and a small door was there, about a two by four door, and went up to the front of the house. We were unable at that time to observe any indications of where this pit was, although we could smell the fermentation of mash. We searched there for probably ten or fifteen minutes, until we found alongside of a post, cleverly concealed, two electric wires running down into the ground. We dug down alongside of those wires until we came to the top, which was some boards, and we cleaned off those boards, and finally found a trap-door. We went through the trap-door and down into a room and there we found mash, and about 50 gallons of jackass brandy. I have seen these bottles that have been introduced for the purpose of identification by the prosecution. Those were samples of that jackass brandy taken in my presence. The defendant was not there at that time. He was subsequently arrested. The premises as far as I know were occupied as a private dwelling. There was a woman, his wife, came down and asked us what our business was there. We

showed our search-warrant and pursuant to that search-warrant we searched the premises. Witness never purchased any liquor on the premises and does not know of any liquor being sold there of his own knowledge. I went there with the other agents and did not go into the house proper.

These premises are occupied as a private residence by the defendant. Had never purchased any liquor on the premises."

It was stipulated that certain liquor which the government used as an exhibit contained 25 per cent of alcohol by volume. The defendant testified in chief as follows:

"I reside at 2202 East Seventeenth Street, with my family. We have nine in the family. There were two other families lived downstairs in two apartments. My home is a two-story house, with a basement underneath. There is an entrance to the basement on the side of the house and also through a little trap-door in one of the rooms on the second floor. The basement may be entered from either way. A fence surrounds the house and the basement is directly under the house, and within the space enclosed by the walls of the house. I have not sold any intoxicating liquors on the premises."

On cross-examination of defendant the following occurred:

Mr. McDonald—Mr. Souza, you owned this still that was found there?

Mr. Gilman—To which I object. It is not proper cross-examination.

The Court—Why?

Mr. Gilman—I put him on the witness-stand for two things: First, to prove the residence; second, that he did not sell liquor there. Those are the two questions I asked him.

The Court—The Supreme Court, in a case from this district, the case of Diggs and Caminetti, held distinctly that when a defendant goes on the stand in his own behalf he opens up the whole subject. Overruled.

Mr. Gilman—Exception noted.

Mr. McDonald—You owned this still, didn't you, Mr. Souza?

Witness—What is that?

. Mr. McDonald—That still that was there, that was your still, wasn't it?

Witness—It wasn't a still. It was part of a still.

Mr. McDonald.—And this jackass brandy, was yours, wasn't it?

Witness—Yes.

Mr. McDonald—You were arrested in 1921, weren't you?

Mr. Gilman—Just a minute. To which I object as being incompetent, irrevelant and immaterial, and not proper cross-examination.

The Court—Overruled.

Mr. Gilman—Exception noted.

Mr. McDonald—Q. You were arrested in 1921 by Mr. Shurtleff, this man here? A. No.

Q. You say you were not arrested?

A. No, only in 1921.

Q. In 1921, on the 9th day of May, 1921?

A. Yes, I was.

Q. You were?

A. Yes; I do not know the day but I was arrested one time before.

Q. Yes, you were caught that time actually running a still, weren't you?

A. Yes.

THE COURT—Did you (Souza) make this jackass brandy?

WITNESS—No, sir, that was given to me to finish up. That was not finished, that is, not ready to drink.

THE COURT—Did you have mash there?

WITNESS—Yes, I had mash there.

THE COURT—And there was actually mash there present, was there?

WITNESS—There was not mash there for that purpose. I was trying to run that mash to get rid of it and run that little to make a little liquor for my own use.

MR. GILMAN—May it be understood that I may have an exception to the questions asked by the Court?

THE COURT—You may have an objection and an exception.

Laying aside consideration of the assignment of errors, the contentions of defendant's brief are substantially two in number:

(a) That the court erred in receiving testimony as to search and seizure of certain property;

(b) That the Court erred in permitting questions to be asked of defendant on cross-examination.

No questions are made as to the sufficiency of the information, nor as to the sufficiency of the evidence to uphold the verdict, nor has any objection or exception been taken to any charge of the Court given or refused.

ARGUMENT

I

The court did not err in admitting in evidence any property taken on an unlawful search.

The greater part of the defendant's brief is devoted to an attempt to show that his rights were violated prejudicially by the court's action in permitting the use in evidence of certain liquors and a certain still seized by officers upon a search, and in receiving testimony of the officers as to the search.

But in this case there is not wanting a search warrant. The officers testified that they had such warrant and acted upon it. Moreover, neither the search warrant, nor the affidavit affording its basis, nor the return showing its execution were put in evidence. And, of course, no such papers have been brought up in the record here.

Accordingly, there is a double presumption as to the integrity of the proceedings.

a) There is the presumption against error, for on appeal the presumptions are with the government as to all proceedings not shown of record.

b) There is also the presumption that official duty has been regularly performed; such presumptions are to be given effect here, unless otherwise negatived.

There has been no question raised, nor can any question be raised, as to the regularity of the form of the several documents, nor as to the regularity of the execution and return of the warrant.

Accordingly, the plaintiff in error here is confined in his attack upon the warrant to such features only as to which testimony may have been directed. And as to even these features where the evidence may be seen to be conflicting the ruling of the trial court is beyond review.

There is rarely brought here such a meager record with a design to test to correctness of a court's ruling in receiving in evidence liquors obtained upon a search warrant.

Referring to the incidental references to the matter in the testimony, it will be seen that the officers testified that they did have a search warrant for the search in question. (Tr. p. 11.) It was further shown by the testimony of witness Shurtleff that he visited the premises prior to this and had noticed the odor of *distillation* and *fermenting mash* around these premises; that witness was "familiar with the odor of fermenting mash and the odor of distillation". A day or so before the search warrant was secured for the place witness visited the place one night and could smell odors of distillation and of

mash (Tr. p. 11) and further on cross-examination the same witness said, "I entered the premises by virtue of a search warrant issued by Commissioner Hardie of Oakland". (Tr. p. 15.) And further, "I say we entered there pursuant to that search warrant." He conceded that, "I or any other person to my knowledge did not purchase or buy any liquor from the defendant there not that I know of. There was not a sale of intoxicating liquor on the premises to my individual knowledge." He said further, "I smelled the odor of distillation there some time previous to the raid previous to March 9, 1923." "I was told that there was liquor being manufactured on the premises." Upon that information and *upon the information of my senses; that is my sense of smell.* I went to the Commissioner and had a search warrant issued for the basement, *for this dugout.* And again, (question by Mr. Gilman), "You were told so and upon that information and upon the information of your senses; that is your sense of smell, you went to the Commissioner and had a search warrant issue. Is that correct?" "A. Yes, sir, *for the basement, for this dugout, yes.*"

Neither the search warrant nor the affidavit were before the court. (Tr. pp. 16, 17.)

Witness Rinckel said, (Tr. p. 19) "We showed a search warrant and pursuant to that search warrant we searched the premises. We never purchased any liquor on the premises and do not know of any liquor being sold there of my own knowledge. Went

there with the other agents and *didn't go into the house proper.*"

The only thing made at all definite by the proof was that there *was* such a search warrant and that, while it may have indicated that the officer was informed of certain things, there was, nevertheless, stated the definite fact that the officer personally examined the premises and came to *know by his sense of smell* of the *fact* of there being fermenting mash there, as well as distillation going on. He stated in his examination that he was familiar with the odors; and it must be presumed that in his affidavit the matter was stated in the strongest possible form necessary to make a proper showing, the affidavit in question not being brought up. We know merely the subject which the affidavit discussed,—that the officer knew the facts pointing to probable cause from his sense of smell, but the court cannot now say that the matter was not stated in such strong, positive form as would have shown probable cause to the Commissioner.

The fact that odors emanate from such contraband manufacture of liquors is well known. We may refer to the statement of Judge Gilbert in his opinion in the case of *Carney vs. United States,* 295 Fed. 610, wherein it was said that,

> "It is a matter of common knowledge that the odor of fermenting mash is penetrating, persistent and pervasive."

In the case of *McBride vs. U. S.,* 248 Fed. 416,

419, the Circuit Court of Appeals of the Fifth Circuit said:

> "At common law it was always lawful to arrest a person without warrant, where a crime was being committed in the presence of an officer and to enter a building without warrant, in which such crime was being perpetrated. *Wharton, Criminal Procedure* (10th Ed.), Secs. 34, 51; *Delafoile v. New Jersey,* 54 N. J. Law, 381, 24 Atl. 557, 16 L. R. A. 500, 502; *In re Acker* C. C.), 66 Fed. 290, 293.
>
> Where an officer is being apprised by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without warrant. *Piedmont Hotel v. Henderson,* 9 Ga. App. 672, 681, 72 S. E. 51; *Earl v. State,* 124 Ga. 28, 29, 52, S. E. 78; *Brooks v. State,* 114, Ga. 6, 8, 39, S. E. 877; *Ramsey v. State,* 92 Ga. 53, 63, 17, S. E. 613. Therefore we are of the opinion that the entry into this stable under the circumstances of this case was legal, and that the court did not err in admitting the testimony of the officers."

The evidence of the commission of crime in the McBride case was derived principally or wholly through the sense of smell.

The case of *United States vs. Borkowski,* 268 Fed. 408, 412, was a case of the same character wherein the officers through the sense of smell came to know that a crime was being committed. The District Court in that case said:

> "The rule, state and federal, is that officers may arrest those who break the peace or com-

mit crimes in their presence. *Bishop's New Crim. Proc.,* Sec. 183; *Byrne, Fed. Crim. Proc.,* Sec. 10; *Wolf v. State,* 19 Ohio St. 248. Byrne states that officers may avert a criminal act in the process of commission before them, either by arresting the doer or seizing and restraining the instrument of the crime. See also *Ross v. Leggett,* 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ex parte Morrill* (C. C.), 35 Fed. 261; *Bad Elk v. U. S.,* 177 U. S. 530, 20 Sup. Ct. 729, 44 L. Ed. 874, and *Kurtz v. Moffit,* 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

While the point under consideration in the two cases just cited was the right of an officer to arrest for a crime being committed in his presence, yet there can be no doubt that the same rule would apply here where the question is as to the statement for probable cause for warrant. In fact, if

there is any difference, the requirements of the former case should be more rigid. The case last cited was a District Court case of course. The cases cited by defendant upon the proposition discussed are also District Court cases. We may say generally as to these that they have not superior rank to that of the Court *a quo,* and that their rulings may not be considered authoritative or of value further than for the reasons given. Indeed, that is merely the statement of a well known principle of appellate practice.

More than that, it may well be observed that when this aspect of a case comes before a trial tribunal, in sustaining a search or a warrant or probable cause, it decides questions of fact, as well as law, and in holding in a particular case that a sufficient showing was not made, it is merely a ruling as to the judge's view of particular facts, so that if the ruling had been either way it would have been sustained by a reviewing tribunal. Such considerations have been heretofore appealed to this court. Thus in its opinion in *Winkler vs. U. S.,* 297 Fed. 202, 203, cited with approval certain language from the case of *Snyder vs. U. S.,* 285 Fed. 1, to wit:

> "Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge and his finding should not be disturbed on appeal unless it is without support in the evidence."

In the instant case the court below sustained the

view that the commissioner, under the law and the facts, had probable cause for issuing the search warrant in question.

It is not correct to say that the showing for the search warrant in the instant case was upon information and belief. While the officers may have been informed by others of certain facts, there was the definite fact apprehensible from one of the senses shown and thus the case was brought within the situation discussed in the case of *Forni vs. U. S.*, No. 4355, 3d Fed. 2d, wherein the affidavit did state the information and belief of the officers but further added the definite fact that he had gone to the premises as here and had seen certain liquors. In the instant case the surroundings were such as that the officer have known that the manufacture was contraband.

There was a showing of probable cause.

Some further contention is made that the premises here in question were a dwelling house and that there was no sale of liquor shown. In the first place it does not appear that in the initial showing before the Commissioner there was disclosed the fact that the premises were a dwelling. In fact, the inference is the contrary. For it was said by witness Shurtleff (Tr. p. 17) that the search warrant was issued for the basement—for this dugout—. Accordingly there was no requirement that the affidavit should show that the case was within one of the exceptions set forth in Section 25 of Title II of the National

Prohibition Act. There is nothing in the Search Warrant Act contained in Title XI of the Espionage Act which requires a showing upon that point. We think it entirely clear that the proceedings are sustainable unless controverted under the provisions of Section 15 of the Search Warrant Act.

It is submitted further that such an issue should be made in advance of the trial, and that in considering the matter now the court should consider it with that in mind.

Looking more particularly to the facts here disclosed, it is seen that there was a large still in a sort of a concealed dugout or subbasement on the defendant's premises and an unusual number of 50 gallon barrels of mash, together with a large amount of the manufactured product. The dugout *was not devoted to any other purpose whatever.* It even had machinery set up, such as electric motors, pump and fans, apparently for the purpose of dissipating the odors, the power being carried in by concealed wires.

It must therefore be clear,

a) That the dugout was not part of the dwelling,

b) That if considered to be a part it falls in the category of a shop as shown by Judge Gilbert in his dissenting opinion in the case of *Temperani vs. U. S., supra,* and

c) That whether a shop or not it was manifestly a use for a business commercial purpose

and thus within the exception in Section 25 of Title II of the National Prohibition Act.

(A) The dugout was not a part of the dwelling.

There was absolutely no other use being made of the dugout, except as a factory or distillery where the defendant had his still and machinery, together with necessary materials. The case thus differs from the Temperani case. While it may have been possible to enter the place from the dwelling proper, yet it was wholly apart from it and the officers entered from the side. They testify that the search warrant was for the dugout. (Tr. p. 16.) It was thus not for the dwelling. And witness Rinckel said, (Tr. p. 19) "I went there with the other agents and *did not go into the house proper.*" The case accordingly would not be different from the case of one who used a portion of the building in which he resided as a place of business. While in the same building, possibly in the same "curtilage," it would not be a part of the dwelling in any proper sense. It would not be the case of including such as a smoke house or other outbuildings of a farmer as a portion of his dwelling or homestead within his curtilage.

(B) Moreover, the dugout was, in any proper sense of the word, being used as a "shop."

The place was devoted to manufacturing distilled liquors from materials brought there. It had cost $1500.00 to install the plant (Tr. p. —). In addition to the machinery of the still, there was also an elec-

tric motor, a pump and fans, the latter being operated apparently by an electric current being carried down by concealed wires and to this thus must be conjoined the circumstance that no activity of home life was there being carried out; the place was used for no other purpose. Thus the observation of Judge Gilbert in the Temperani case is very pertinent. He there said:

> "It would be a permissible construction to hold that the defendant's garage, devoted, as it was, to manufacturing purposes, was a shop within the meaning of the statute. The Century Dictionary gives as one definition of a shop:
>
> > 'A room or building in which the making, preparing, or repairing of any article is carried on, or in which any industry is pursued.'
>
> A definition in 25 Amer. & Eng. Enc. of Law, 1058, is:
>
> > 'A building in which mechanics labor and sometimes keep their manufactures for sale.'
>
> In *Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.,* (C. C.) 45 Fed. 304, 314, Judge Caldwell said:
>
> > 'Commonly, the word 'shop' means a building inside of which a mechanic carries on his work.'
>
> In *State v. Hanlon,* 32 Or. 95, 48 Pac. 353, it was held that a room wherein a workman pursued his business and kept his tools or the products of his labor was a shop, and in *McNab v. McGrath,* 5 U. S. Q. B. O. S. 516, a shop was

held to be a room where manufactures of some kind are carried on."

(C) In any event, considering the use to which the dugout was being put, whether it be called literally a shop or not, it was being used for a business purpose of the same character as if used for a store, shop, saloon or restaurant. That is to say the words "such as" as they appear in stating the exceptions in Section 25 of Title 2 of the National Prohibition Act, they are followed by the words for illustration rather than limitation or restriction. The matter is thus put by Judge Gilbert in the same opinion as follows:

> "But, irrespective of the question whether the room so occupied here as a distillery was a shop, there can be no doubt that the purpose to which the plaintiff in error devoted it partook of the nature of the classes of business specified as creating exceptions to the statute. It seems reasonably clear from the language of the statute that Congress intended to except from the protection against search all dwelling houses, a considerable portion of which are devoted to business purposes. The business purposes in contemplation were illustrated by referring to shops, saloons, etc.; but obviously it was not the intention to limit the exception to the precise kinds of business so enumerated. Otherwise there would have been no occasion to insert the words 'such as'. In other words, it is inferable that Congress intended to illustrate its purpose by reference to certain specified kinds of business, but did not intend to limit the ex-

ception to those which were enumerated, or to exclude others not dissimilar thereto.

"A private dwelling, used partly for dwelling house purposes and partly for carrying on any well-known business, should be held to be within the exception, as, for instance, a dwelling house used partly for a factory, a public garage, a filling station, a brewery, a distillery, or a storage warehouse. It may be conceded, as was held in *United States v. Kelih* (D. C.) 272 Fed. 484, that a dwelling house does not lose its character as such, and become a distillery, merely because a home-made still is found in operation therein; but in the present case the upper story was used as a dwelling house, and the basement, unconnected therewith, was used as a distillery, and the plaintiff in error was engaged in manufacturing intoxicating liquors upon a large scale, and indisputably for commercial purposes. It would, indeed, be a strained construction of the statute which would mean that a distiller or a brewer may so construct his dwelling as to combine with it a brewery or a distillery, and thereby obtain immunity from search or seizure"

It is pertinent to quote the following definition from the Louisiana Civil Code:

"The words 'such as' are employed to give some example of the rule and are never exclusive of other cases which that rule is made to embrace." C. C. Louisiana, Art. 3556, Sub. 29.

While it may be observed that this was a statute it was no doubt designed to state an existing current

definition rather than to accomplish a statutory alteration of the meaning of the words.

And in Webster's International Dictionary in re "such", it is stated:

> "Such often followed by 'that' or 'as' introduces the words or propositions which define the similarity or standard of comparison."

And in the case of *Harris vs. Nashville C. & St. L. Railroad Co.,* 44 Southern 962, 963, 153 Ala. 139, there was a point discussed turning on the meaning of the word "such as" when used in a statute and it was decided that what followed was *suggestive* rather than *mandatory.*

It is submitted that under lexicological definitions the word "such" imports similarity; that is to say, in the instant case it would be held to be equivalent to a statement that there was to be excepted places of business similar to stores, shops, restaurants, etc.

Accordingly it is submitted that a proper construction of the language constituting the exception in Section 25 of Title II of the National Prohibition Act would include in the exception such a place of business as here where it was apparently on a commercial basis and absolutely nothing pertaining to the home was there carried on. It is just as much within the purpose and intent of the law as would be any other business or store.

The dugout was thus searchable.

II

The defendant did not raise any question upon the search warrant seasonably; the court was not required to turn aside during the trial of the case to determine the collateral issue.

It is well settled that when evidence is offered in a criminal case which is said to be incompetent from some collateral reason depending on outside proof that the court cannot be expected to turn aside from the business at hand and determine the collateral issue. The result is that as a rule motions to suppress evidence and quash a search are made by a motion in advance wherein proper notice can be given and proper proofs taken. This was expressly declared by the Supreme Court of the United States in the case of *Adams vs. New York,* 192 U. S. 585, 48 L. Ed. 575, 579.

While it is true that in the later case of *Gouled vs. U. S.,* 255 U. S. 598, and perhaps in the case of *Amos vs. U. S.,* 255, U. S. 315, the court, speaking through Mr. Justice Day, declared that this was not a hard and fast rule, but, nevertheless, the rule was recognized and not set aside. It was said to be a very proper rule of procedure.

Accordingly, in the Gouled case when it appeared that the defendant did not know of the seizure of the incriminating document by stealth until it was produced to him when testifying on the stand and when it further appeared that the facts constituting the search were not in dispute, the court properly

said that Gouled would be entitled to raise the matter without a preliminary motion.

In the Amos case it appeared that the facts of a very flagrantly illegal search were admitted so that the court had nothing to do but apply questions of law.

But the instant case is one for the proper application of the rule of the Adams case if there ever was one.

It is not true that the record shows that the defendant had no knowledge of the search until the time of the trial. He had an opportunity to so state on the stand and he did not do so. The officers testified that they served the search warrant. What they did there would have been manifest to any householder. The presumption of regularity attaches to the return which would indicate the leaving of a copy and proper service. Since there is no showing but that the defendant knew all about the search from the beginning, he should have been held to move seasonably to quash the evidence, yet, while the search was on March 9, 1922, no question had been made concerning it until the trial had on the 9th of April, 1924. Thus there is the situation of the officers of the law regularly serving and executing of search warrant and making a return. No question is made as to the validity for two years, when suddenly during the trial of the action question is made as to whether the defendant was not

entitled to have the search warrant quashed by virtue of outside testimony as to which the government could not have been deemed to have been prepared.

Under the Adams case supra, and other cases in the same line, the court properly refused to quash the search warrant when attacked at so late a day.

III

The court did not err in respect of the cross-examination of defendant; the questions asked were clearly within the scope of his examination in chief.

The case of the government being in so that it could be seen just what the government's contention was, the defendant took the stand and testified to certain facts. (Tr. p. 22.)

He said he resided at 2202 E. 17th Street, which were the premises previously referred to. He said further, "There are two families living downstairs in two apartments." He referred to the basement underneath. Said it could be entered on the side of the house or through a little trap door through one of the rooms on the second floor. He further said, "I have not sold any intoxicating liquor on the premises."

Upon such a basis he was asked if he owned the still that was found there. It was to this question that the objection was interposed that it was not cross-examination. That it was within the issues of the case is undoubted. That it was within the scope

of the general examination is esaily seen. The government had proven that the still was found in the dugout underneath the house, Souza not being present. If Souza could convince the jury that two other families lived *downstairs* in two apartments there might be some warrant for urging upon the jury that the still did not belong to defendant. Manifestly it was a direct denial of that possible inference, to compel Souza to admit that it was he and not one of the other families who owned the still.

Moreover, he undertook to show the connection between the dugout and other portions of the house, seeking perhaps to have the jury draw the inference that it all constituted a portion of the house. It was in negation of such inference to prove that in the dugout there was this large still, a large amount of mash and manufactured brandy in amounts sufficient to indicate that a commercial purpose was intended by the possessor. In the examination in chief defendant also said, "I have not sold any intoxicating liquor in the premises." Clearly it would have been in negation of that testimony to some extent to show that there was such a quantity of liquor stored there, together with a still and the necessary mash to indicate that if defendant owned the property it was exceedingly likely that he had it for commercial purposes and thus not only intended to sell but actually had sold.

The situation bears a close analogy to that under review in the case of *Temperani vs. United States,* 299 Fed. 365. There, as will be seen from the tran-

script, (No. 4129) Temperani took the stand for almost the same general purpose. He stated his residence, described his family and described the various connections between the garage there in question and the remainder of the house. He did not state that there were any other families with him, nor did he deny that he had sold liquor. In the Temperani case the defendant was required on cross-examination to admit the ownership of a still found in the basement, although not mentioned in the examination in chief. Yet in response to a similar contention in that case, this court said in the majority opinion,

> "There is some claim that this admission was brought out through improper cross-examination, but the plaintiff in error took the witness stand for the purpose of proving what he kept in the garage, and the connection between the garage and other portions of the house, and the cross-examination was not entirely without the scope of the testimony thus given on direct." p. 367.

and thereupon the conviction upon one of the counts of the information was sustained upon the admissions of the defendant thus given on cross-examination.

Indeed, as was well said by the Supreme Court of the United States in the case of *Gilmer vs. Higley,* 110 U. S. 47, 28 L. Ed. 62:

> "To permit a party to the suit to tell his own tale of a transaction like this and to conceal

> what is important to the defendant in regard to the same occurrence and at the same time would be a gross perversion of justice and would bring into discredit the policy of permitting parties to actions to testify in their own behalf."

The same question was under review by this court in the case of *Diggs vs. United States,* 220 Fed. 545, 553. There the defendant testified as to various matters prior to what was termed the "trip to Reno." He was required to describe that trip on cross-examination.

Another case where this court held that the cross-examination did not exceed the scope of the main examination was *Kettenback vs. United States,* 202 Fed. 377, 385.

The same considerations herein adverted to apply to the questions asked defendant on cross-examination as to his arrest a few months previously. For it will be noted that as a part of the government's case and relevant upon the question of his intent necessary to be shown under Count One of the information, there was a previous offense shown of the same character and at the same place. (Tr. p. 13.) For it appeared that Witness Shurtleff visited the same premises May 9, 1921, and found there 10 or 12 fifty gallon barrels of mash, 50 gallon still set up and running and with plant and motors, and found Souza in the dugout.

Now if this testimony was true it would in a measure contradict the two statements made by

defendant in his examination in chief. It would tend to show that he and not the two families referred to owned the still. For he was then compelled to admit that he had possession of it at a former occasion. It would also be some evidence negative to his contention that he had actually sold no intoxicating liquor on the premises. For if he was actually in the operation of a large still of that character the court could have inferred that he was not carrying on such a commercial enterprise in manufacturing liquor for his own use; that he must have sold the liquors. In a measure it contradicts the matters referred to in the examination in chief.

It is to be borne in mind that, since the information did not charge a sale of liquors, whether the defendant actually sold liquors was not directly an issue. It only became material upon the collateral issue raised by the defendant to the effect that the warrant was improperly issued since he sold no liquor in the premises. It is submitted that upon this issue the burden was on the defendant. The warrant could have regularly issued without that feature being referred to in the showing of probable cause. It was thus incumbent upon the defendant to assume the burden of showing the non-sale in determining the collateral issue raised which was in effect an attack upon the search warrant under Section 15 of the Search Warrant Act.

Referring more particularly to the question as to the arrest of the defendant, it is submitted that such

was merely a preliminary matter of leading to the real point proven. That is to say, that on the occasions when he was arrested he was actually caught running the still. The matter was not without the main issue, since it was involved under the question of intent.

Upon a collateral issue, as to which the defendant had the burden of showing the facts, that is to say: the issue whether he had sold liquor on the premises and thus made a case for a search warrant, the defendant, having the burden, testified that he had *not sold* such *intoxicating liquor* on the premises. It thus became relevant to show on cross-examination that he had the still and one of the character described in the evidence, and not only that, but that he had a still at the same place on the 9th day of May, 1921. If either fact was true, it would be unlikely that he had not sold intoxicating liquor. And while he was asked about an arrest in introducing this latter incident, that was merely a part of the inducement leading up to the actual question, that is to say: as to whether or not he was caught running a still there at that time. It is not a case of proving a mere arrest as an isolated incident leaving the matter in doubt. Thus the mere incidental reference to his arrest on the occasion when he was caught violating the law in running the still could not have prejudiced.

Nor did the court err in asking the questions referred to on page 25 of the Transcript. These ques-

tions were of the same character as the others just adverted to, and that a District Court may in the aid of a proper elucidation of the facts ask questions is well settled, as this court well said in the case of *Kettenback vs. United States,* 202 Fed. 385, supra:

> "The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses. In the case at bar there was no such expression of opinion by the court, and there is nothing in the record which is before us to indicate or to give the jury the impression that the judge was in any degree partial or biased or prejudiced against the plaintiffs in error."

As to modification of sentence.

While no point or question has been raised in defendant's brief as to excessive sentence, we note from the record that the third count was for the manufacture of liquors and it appears to us that under Section 29 of Title II of the National Prohi-

bition Act the punishment for that is limited to six months; the sentence here was for one year imprisonment.

Unless we are misapprehending some point in the record, we would understand that the judgment here should be modified so as to eliminate the excess. If the conviction is otherwise proper, and if we have shown that it was, there would be no necessity for altering anything but the judgment, and, under the authority of the decisions of this court, we urge that any modification should be made here by striking out the excess. Thus in the case of *Millich vs. U. S.*, 282 Fed. 604, 606, this court quoted with approval the following statement from 12 Cyc. 938:

> The appellate court, in affirming a conviction, may modify the punishment imposed by the trial court, by mitigating, reducing, or otherwise changing it, so far as it exceeds the limits prescribed by the statute. This rule applies to a fine or a sentence to a term of imprisonment in excess of that permitted by a statute, to a fine rendered against defendants jointly, to a sentence on a general verdict of guilty where one of several counts is unsustained by any evidence, and to a premature sentence."

And in the case of *Jackson vs. U. S.*, 102 Fed. 473, it was ordered that the judgment be modified by striking out the words "at hard labor" and thus modified and affirmed.

Wherefore we submit that the sentence may be modified by this court.

In conclusion it is submitted that the validity of the search involved in the case at bar was not properly raised by the defendant; that if deemed raised properly, the search was entirely valid, especially in face of any such objection as is here made; that the cross-examination was not improper; that the trial was free from error, the defendant was justly convicted and should serve his sentence.

Respectfully submitted,

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Defendant in Error.